IN THE

Supreme Court of the United States

October Term 1942

No. 469

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

MERCY BROWN STEPHENS,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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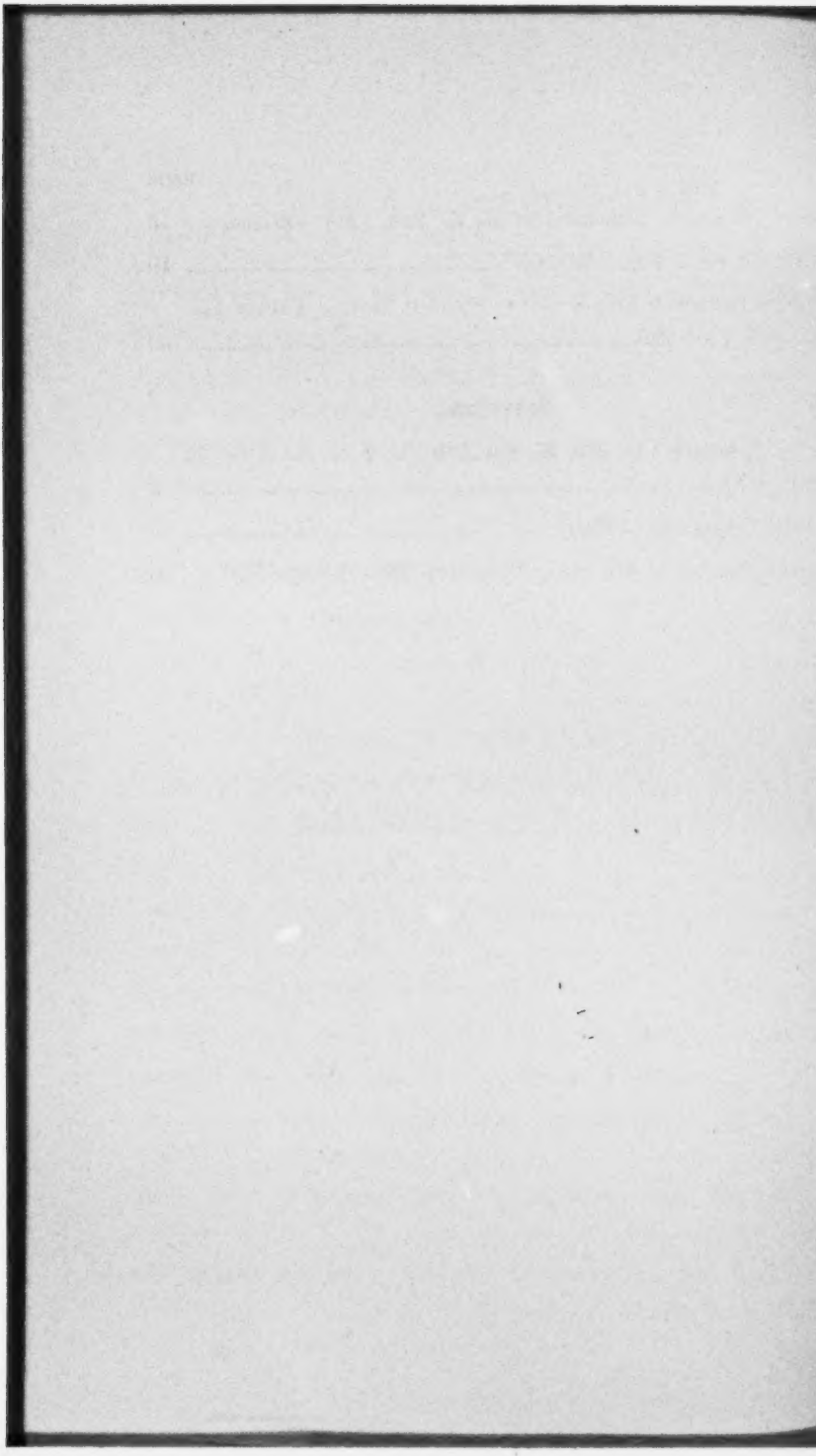

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No. .....

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

MERCY BROWN STEPHENS,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered July 17, 1942, reversing the judgment of the District Court for the Southern District of California, Central Division, and directing said District Court to render judgment *nunc pro tunc* of date September 26, 1940, for $9,777.14.

Opinions Below.

The Circuit Court of Appeals has written two opinions. The first opinion was filed June 27, 1941, and is reported in 121 Fed. (2d) 218. This opinion is also reproduced in the Appendix to this petition, and in the transcript of record [R. 766].

The second opinion, filed July 17, 1942, has not yet been reported. It appears in the transcript of record [R. 785] and also in the Appendix hereto. A petition for rehearing was filed by petitioner and was denied on September 8, 1942 [R. 793].

Basis of Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. A., Title 28, Section 347.

2. The date of the rendering and filing of the opinion of the Circuit Court of Appeals petitioned to be reviewed [R. 791] and of the entering of the judgment based thereon [R. 794] is July 17, 1942.

3. A petition for rehearing was "filed August 15, 1942, and within the time allowed therefor by rules of court," and was denied on September 8, 1942 [R. 793].

4. Order staying issuance of mandate to and including October 13, 1942, and thereafter in the event petition for writ of certiorari be docketed, until the Supreme Court passes thereon, was signed by Honorable Curtis D. Wilbur, Senior Circuit Judge, and filed September 8, 1942 [R. 794].

5. An extension of said order to and including October 23, 1942, was signed by Honorable William Denman, Circuit Judge, and filed September 28, 1942 [R. .....].

6. This petition for writ of certiorari was filed on the ..... day of October, 1942, in accordance with the provisions of the order staying mandate and extension of time thereon.

7. The following cases are believed to sustain the jurisdiction of this Court to grant certiorari:

Erie Ry. Co. v. Tompkins, 304 U. S. 94;

Stoner v. New York Life Ins. Co., 311 U. S. 464;

Six Companies v. Highway Dist., 311 U. S. 180.

Summary Statement of Matters Involved.

This action, a suit of a civil nature at common law, between citizens of different states, was begun by the filing of the complaint in the Superior Court in the State of California, in and for the County of Los Angeles, wherein plaintiff, the respondent herein, sought to recover of the defendant, the petitioner herein, the sum of six thousand nine hundred fifty dollars ($6,950.00); thereafter defendant caused the same to be removed to the United States District Court, Southern District of California, Central Division; all in due course and in accordance with law [R. 16-25].

The basis of said action is a preliminary term non-participating twenty-payment life insurance policy in the face amount of ten thousand dollars ($10,000.00), issued in Los Angeles, California, on or about March 20, 1925, by the International Life Insurance Company of St. Louis,

Missouri [Plaintiff's Exhibit 1, R. 175-201]. In the policy it was stated that:

> "This policy is issued on the New Triple Option Guaranteed Premium Reduction Plan"

and included in the policy were certain coupons, the use of which was confined to the following options:

> "Option 1. The Insured may use the amounts designated in the coupons hereto attached for the reduction of his premium payments from year to year.
>
> Option 2. The Insured may elect to pay all premiums without reduction, in which case the Company guarantees that, after payment of premiums in full for 16 years and surrender of this policy duly discharged and all attached coupons to the Company, a policy paid-up for life for the face amount hereof, granting excess interest dividends. will be issued, If the available cash value and coupon accumulation is in excess of the net single premium for such paid-up insurance according to the American Experience Table of Mortality and interest at the rate of three and one-half per cent per annum, such excess shall be paid in cash to the Insured.
>
> Option 3. The Insured may elect to pay all premiums without reductions, in which case the Company guarantees that this policy shall mature as an endowment after paying the premiums in full for 18 years; and, upon surrender of this policy duly discharged and all attached coupons on the first anniversary of this policy after such payments are completed, the face amount of the policy less any indebtedness to the Company, will be paid in cash. If the available cash value and coupon accumulation is in excess of the face amount of the policy, such excess shall be paid in cash to the Insured.

In case the Insured shall pay all premiums in full, without coupon reduction, the unused due coupons shall be placed to the credit of the policy and shall be payable at any time, together with compound interest at the rate of three and one-half per cent per annum for each full year after due dates thereof; or, in the event of the death of the Insured said amount shall be payable to the beneficiary in addition to the face amount of the policy.

Accumulated value of coupons, at the end of 5th Yr. $533.30, 10th Yr. $1401.40, 15th Yr. $2532.20, 20th Yr. $3975.10." [R. 196.]

Each of the coupons included in the life insurance policy provided:

"On or at any time after ..... $..... International Life Insurance Company, St. Louis, Mo., will pay to the order of the insured under Policy 156284 (or to the order of the assignee if said policy is assigned) 181.80 dollars subject to conditions of said policy, provided all premiums due on said Policy up to and including said date have been paid. No. ..... Payable at its Home Office.

J. R. PAISLEY
President."

The coupons were for increasing amounts, ranging from $117 due and payable March 20, 1926, to the final coupon due and payable March 20, 1944, in the amount of $181.80, one such coupon falling due each year on the policy anniversary date.

Prior to September 1, 1933, all policy obligations of the International Life Insurance Company were reinsured by the Missouri State Life Insurance Company, hereafter called Missouri State [R. 4].

Under date of August 26, 1933, the Superintendent of Insurance of the State of Missouri (hereafter called Superintendent), proceeding under Sections 5940 through 5951 of Revised Statutes of Missouri, 1929, filed his petition for a decree declaring the Missouri State to be insolvent, and to enjoin it from doing further business [Defendant's Exhibit D, in evidence, R. 544; Petition, R. 547-549].

On the 28th day of August, 1933, said petition was granted and the Superintendent was vested with title to the assets and custody of the books and records of the insolvent company [Defendant's Exhibit D, R. 551-553].

On September 7, 1933, the assets of the insolvent company were under decree of court, sold to this petitioner [Defendant's Exhibit D, R. 553, *et seq.*]. The terms of said sale were set forth in the decree in the form of a contract between this petitioner and the Superintendent, which contract was entitled "Purchase Agreement" [Plaintiff's Exhibit 2, in evidence, R. 205, Exhibit, R. 209-250].

Article I of the so-called Purchase Agreement provided for the sale by the Superintendent, of all of the assets of the then defunct Missouri State to the petitioner, General American Life Insurance Company (hereinafter called General American), and the latter company agreed as consideration for such sale, to pay the sum of one hundred thousand dollars and such other sums as would be necessary to pay preferred claims in full, secured creditors to the extent of the value of their security, and fifty per cent of all other claims against the said Missouri State [R. 210].

Article II and subsequent articles of the Purchase Agreement provided that the General American would assume all of the policy obligations of the defunct Missouri State, including payment of death claims in full for a period of fifteen years, subject to certain restrictions and limitations therein expressed [R. 212]. The principal qualifications or limitation was the imposition of a policy lien upon all of the policies so assumed except certain policies specifically excluded therefrom, which lien was provided for in Section (c) of Article II, reading as follows:

> "Liens.—Inasmuch as the present appraised value of the assets purchased hereunder is less than the required reserves, a lien (adjusted to the nearest dollar) equal to 50% of the terminal reserve on each policy of life insurance and each annuity policy as such reserve has been established in the accounts of the Old Company, computed as of September 1, 1933, to the date to which premiums on such policies have been paid, will be established and placed against each such policy; provided, that in no case shall such lien exceed the amount by which said reserve shall be in excess of the indebtedness on any such policy as of September 1, 1933. Such lien shall bear interest at the rate of five per cent (5%) per annum from September 1, 1933, until September 1, 1948, and thereafter at the rate of four per cent (4%) per annum, such interest to be paid on each policy anniversary date, and if not so paid, to be compounded annually; and said lien and interest shall be treated otherwise in all respects and with like effect as policy loan indebtedness under the terms of such policy. Such lien and its accumulation shall be carried as an asset by the New Company with like effect and in like manner as policy loans. * * *

Every such lien, together with the interest thereon, will be deducted from any payment made by the New Company pursuant to the terms of each such policy or from any settlement made thereon or from the value used to purchase or provide any paid-up or extended insurance or to exercise any option provided by said policy, except that should the insured die before September 1, 1948, the New Company will, if the policy be then in force in accordance with its terms as modified by the terms of this Agreement, waive such lien in the payment of such death claim, subject, however, to the deduction of any accrued interest on the amount of such lien. The mortality cost of waiving such lien shall be provided out of the net earnings of the business of the Old Company purchased hereunder."

In the Purchase Agreement, including that portion of Section (c) Article II, quoted above, the Missouri State was referred to as the "Old Company."

It was further provided that the General American would keep a separate account of the business reinsured and the assets acquired which account would be kept on a record in the form of the statement required by the National Convention of Insurance Commissioners, which statement is commonly known as the Convention Blank [Art. V., R. 226-233].

For a period of fifteen years General American agreed to use the net earnings derived from the assets and business so acquired, to reduce the liens above provided, at periodical intervals. At the end of the fifteen year period the lien, if any then remained, would become permanent [Art. VII, R. 238-241]. There were other limitations and qualifications but such are not material here.

A policyholder desiring to continue his insurance under the terms and conditions set forth in the Purchase Agreement, could so elect by his failure to file a claim with the Circuit Court of the City of St. Louis, Missouri [R. 225].

At the time of insolvency, the Missouri State had over two hundred fifty thousand policies [R. 704] and a policy reserve liability of over 120 million dollars [Defendant's Exhibit B, in evidence, R. 590, at 596].

The General American upon the basis of reserves inquired for the death benefit and the coupon liability included in the policies assumed, as aforesaid, computed the lien on the policy of life insurance involved here, as being $1,054.00 [Defendant's Exhibit N, in evidence, R. 689; Exhibit, R. 689].

On March 20, 1934, the annual premium on the policy involved here became due, together with interest of $183.00 on an outstanding policy loan of $3,050.00 (loan having been made in January, 1933) and was not paid. [Agreed Statement, pars. 11 and 12, in evidence, R. 255-256.]

The policy of life insurance contained a provision for forfeiture in the event of nonpayment of premium, and the policy loan agreement provided for forfeiture for nonpayment of loan or interest where the loan equaled the then cash value [Plaintiff's Exhibit 3, R. 46; in evidence, R. 255].

Neither the premium in the sum of $936.00 nor the loan interest in the sum of $183.00 was ever actually paid and it is conceded that the policy was validly forfeited at the end of the grace period following the due date of March 20, 1934, unless petitioner has misconstrued the Purchase Agreement by establishing this lien to cover the policy

reserves including those reserves occasioned by coupon liability [R. 622].

On October 22, 1934, the policyholder, Louis Frederick Stephens died [Agreed Statement, par. 7, in evidence, R. 251] and thereafter on October 21, 1938, this suit was instituted as herein stated, the theory of plaintiff's action being that the General American was not authorized to impose a lien upon the coupon values as contained in the life insurance policy and that the full value of such coupons unencumbered by a lien, should have been used toward the payment and satisfaction of the indebtedness against said policy, or applied toward the purchase of extended insurance under said policy [Complaint, par. XI, R. 11, 12].

The cause was tried by the District Court without a jury, waiver thereof having been filed, which trial resulted in a judgment against petitioner in the amount of $9,942.34 plus interest [R. 127-128].

At the trial the Court refused to permit the introduction of exhibits and testimony on behalf of petitioner, which evidence, if admitted, would have shown that the Superintendent, the General American, and the Circuit Court of the City of St. Louis, Missouri, at the time of execution and approval of the Purchase Agreement hereinbefore described, construed the language

> "terminal reserve on each policy of life insurance * * * as such reserve has been established in the accounts of the Old Company"

as including the reserves made necessary by reason of the liability upon the coupons included in the life insurance policy and that such construction has been the uniform

construction adopted by the Superintendent and the General American since the date the Purchase Agreement was executed. Such construction is manifested by Defendant's Exhibits B, E, G, H, I and J, and the testimony offered in conjunction therewith. Defendant's Exhibit B [in evidence R. 590, Exhibit, R. 593-596] is the Superintendent's Report of Condition of Missouri State Life Insurance Company as of August 28, 1933. This evidence, while admitted, was rendered ineffectual by the Court's refusal of Exhibits H, I, and J. Defendant's Exhibit G [in evidence, except entries by General American, R. 617; exhibit, R. 618] contains entries made in the course of business as required by the lien provision (Art. II, Sec. (c)) of the Purchase Agreement, namely "Insurance Lien $1054.00. Int. pd. to 9/1/33 * * Coup. Res. 9-1-33 $1054.00." These entries were excluded [R. 615-616]. Defendant's Exhibit E [in evidence, R. 609, except entries by General American; exhibit R. 610] also contained an entry similarly excluded, namely "Acc. $1054.00 App'd to Ins. Lien.". The entry was excluded [R. 607]. Defendant's Exhibits (for identification) H [R. 626], I [R. 628] and J [R. 630], together with an Offer of Proof, were offered into evidence twice: first offer [R. 662-663] objections sustained [R. 664, 665], second offer [R. 710] objections sustained [R. 711]. These exhibits were the "accounts of the Old Company" specifically excluded under the rule of strict construction [R. 642-645].

Since liens imposed upon policies of the former defunct Missouri State are to be and have been reduced from the net earnings of the business and assets of that company, the additional liability upon the class of policies involved

here as created by the decision of the courts below, will reduce the funds now available and hereafter to be available for lien reduction purposes [Art. VII, R. 238-241].

Notwithstanding the fact that the Purchase Agreement was made between the Superintendent as representative of the over two hundred fifty thousand policyholders of the former Missouri State, and the General American, with the sanction and approval of the Circuit Court of the City of St. Louis, Missouri, the trial court held such evidence to be inadmissible and that the rule of strict construction required a finding against the petitioner on the question at issue [R. 642-645].

In due course and as required by law, petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit [R. 152-171, 743, 744-763].

In the Circuit Court two opinions have been rendered. In the first opinion (reported in 121 Fed. (2d) 218) the Court held:

> "In the first place the contract is not one shown to be drawn by the insurer without participation on behalf of the insured. We may properly assume that the insurance commissioner and the assuming company dealt at arms' length in framing the contract terms, including the lien provisions. Hence the rule as to interpretation of ambiguities against the insurer does not apply." [R. 778, Appendix pp. 11-12.]

and further that:

> "We have seen that until paid these coupons are 'credited to' the policy by its express terms. They are integral parts of the entire insurance contract. In making the contract for the assumption of the liability of the Old Company on its outstanding policies, it

> is obvious that the insurance commissioner would be as much concerned with the reserves to meet the coupons credited to the policy as to those to meet the credit of its cash surrender value." [R. 777-778, Appendix p. 11.]

and further held that the "rejected evidence shall be received" and that:

> "whatever the phrase 'terminal reserve on each policy' may mean when standing alone, it here includes any amount for coupon liability which is shown to have been established by computation on the company's accounts as a reserve for that purpose." [R. 782-783, Appendix p. 15.]

After rendering the above opinion a petition for rehearing was granted, and thereafter the Court rendered its second opinion (not yet reported) reversing itself and holding:

> "We are of the opinion, contrary to our former view, that the trial judge properly held that appellant's agreement is an insurance agreement to be strictly construed against appellant insurer." [R. 789, Appendix p. 20.]

and further that:

> "Applying the usual rule of construction against the insurer's own phraseology, we accept as a reasonable interpretation of the phrase 'terminal reserve on each policy of *life* insurance,' that it is the reserve on the 'life insurance' agreement only. It is such reserve so limited which appellant must show was 'established in the accounts' of the defunct company." [R. 791, Appendix p. 21.]

Thus the Court, relying upon the rule of strict construction, forbade the introduction of any evidence to show the mutual intent of the parties to the Purchase Agreement at the time it was executed, pursuant to the orders of the Circuit Court of the City of St. Louis, Missouri. This despite the fact that for more than five years prior to the filing of this suit [Oct. 21, 1942, R. p. 23] the parties to said agreement had been engaged in the performance thereof and that there was no evidence whatever of any dispute or difference or disagreement between said parties as to the reserve upon which the lien was established and notice of thereof given to all policyholders of the defunct company.

Questions Presented.

1. Whether the provision of the Purchase Agreement imposing "a lien equal to 50% of the terminal reserve on each policy of life insurance * * * as such reserve has been established in the accounts of the Old Company" can be applied to the reserve on an entire policy so as to render the policy divisible and not entire, and thus impose the lien on a part of the policy reserve rather than on the entire policy reserve.

2. Whether evidence establishing that the parties to the Purchase Agreement understood at the time of its execution, that the lien imposed thereby on the reserve on each policy of life insurance applied to the entire reserve on a coupon policy, including the coupon reserve, was competent to prove the intention of the parties and assist the Court in correctly construing the contractual provision imposing liens on policy reserves.

3. Whether the rule of strict construction can be applied against petitioner as a party to the Purchase Agreement arrived at by negotiation with the Superintendent of the Insurance Department of the State of Missouri, and judicially approved by the Circuit Court of the City of St. Louis, Missouri, either as a rule of first or ultimate resort, and particularly whether the rule of strict construction may be applied against petitioner so as to exclude a consideration of evidence showing the uniform construction of the Purchase Agreement by the parties thereto, the circumstances surrounding the making of such agreement and its approval by the Circuit Court of the City of St. Louis, Missouri, and the evidence as to status of the accounts of the Old Company (Missouri State Life Insurance Company) which established a reserve liability including coupon reserves on all coupon policies.

Reasons for Granting Writ.

The Circuit Court of Appeals has decided important questions of local law in conflict with applicable local decisions.

The Circuit Court of Appeals has decided important questions in conflict with decisions of other Circuit Court of Appeals.

Conflict With Decisions of California.

The federal jurisdiction in this case derives from diversity of citizenship. Under *Erie R. Company v. Tompkins*, 304 U. S. 64, the law of California applies and should have been followed by the Circuit Court of Appeals.

(A) In its second opinion [Appendix] the Circuit Court of Appeals held the lien imposed by the Purchase

Agreement of petitioner [R. 791] in an amount "equal to 50% of the terminal reserve on each policy of life insurance" applied to part but not all of the reserve on a coupon policy, exempting from lien the reserve on the coupon liability. In so holding, it severed the coupon provision from the policy and ruled it a separate contract distinct from other policy provisions. In *Blackburn v. Home Life Insurance Company of New York,* 19 Cal. (2d) 226, 120 Pac. (2d) 31, the Supreme Court of California held that a life insurance contract containing provisions for supplementary benefits, such as disability benefits, constitutes a single integral insurance policy to be dealt with as a whole. The decision of the Circuit Court of Appeals is in conflict with this California decision and fails to follow and apply California law.

The effect of the decision limiting the imposition of the lien to the so-called life insurance reserve transcends the immediate case and directly involves the rights of all policyholders, 250,000 in number, whose policies were assumed by petitioner under the Purchase Agreement.

(B) On another important question the second decision of the Circuit Court of Appeals is in conflict with applicable local decisions of California.

In its second decision, the Court in holding that the established lien extended to only a part instead of the entire policy reserve, applied the rule of strict construction against petitioner as a rule of first resort, and sustained the District Court in excluding evidence offered by petitioner of the intention and understanding of the parties to the Purchase Agreement at the time of its execution, that the lien imposed thereby on the reserve of each policy

of life insurance applied to the entire policy reserve, including coupon reserve.

This rejected evidence offered by petitioner to assist the Court in arriving at the true intentions of the parties, included Defendant's Exhibit H [R. 626], Exhibit I [R. 628] and Exhibit J [R. 630]. Petitioner offered to prove that a comparison of these exhibits with Defendant's Exhibit B [R. 593] would establish that the Superintendent of Insurance—one of the parties to the Purchase Agreement—had reported coupon reserves as an integrated part of reserves upon policies of life insurance of the Missouri State to which they were attached.

By portions of Defendant's Exhibit E [R. 610] and Exhibit G [R. 618], also excluded, petitioner offered to prove that General American—the other party to the Purchase Agreement—had also intended and understood that the reserve on a policy of life insurance was the entire reserve including the coupon reserve.

In applying the rule of strict construction to the Purchase Agreement as a rule of first resort, and in excluding evidence of the intention of the parties to the contract, and their construction of its terms, the second decision of the Circuit Court of Appeals is in conflict with the decision of the Supreme Court of California in the case of *Balfour v. Fresno Canal & Irrigation Company*, 41 Pac. 876, in which the California Supreme Court said:

> "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversa-

> tion between and the declaration of the parties during the negotiations at and before the time of the execution of the contract may be shown."

and the Court held:

> "that the excluded evidence was of a character admissible to explain and fix the intention of the parties in the employment of the language used."

The decision of the California Supreme Court in the case of *United Iron Works v. Outer Harbor Dock & Wharf Co.*, 141 Pac. 917, also sustained the rule that parol evidence is admissible,

> "* * * where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what was said."

The second decision of the Circuit Court of Appeals is also in conflict with the decision of the California Supreme Court in the case of *Mitau et al, v. Roddan, et al,* 84 Pac. 145, where the California Court held that:

> "The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions"

and with the decision of the California District Court of Appeal, First District, in the case of *Weaver et ux, v. Grunbaum, et al,* 87 Pac. (2d) 406, in which case it was held that:

> "Where the language of a contract is reasonably susceptible of more than one interpretation, evidence of the subsequent conduct of the parties thereunder is important in revealing to the Court the construction which the parties themselves placed upon it."

Conflict With Decisions of Other Circuit Courts of Appeals.

(A) The decision of the Circuit Court of Appeals severing the coupon provision from the policy and ruling it a separate contract distinct from other policy provisions is in conflict with decisions of other Circuit Courts of Appeals. The contract involved is a policy of life insurance. The coupon provision adds an investment feature, integrated with the life policy. The question whether incidental features of a contract may be considered separately or allowed to change the fundamental nature of the contract in which they are integrated has been answered in the negative, by the Circuit Court of Appeals for the Sixth Circuit in *In re Weick*, 2 Fed. (2d) 647, and in *Maskowitz v. Davis*, 68 Fed. (2d) 818 and by the Circuit Court of Appeals for the First Circuit in *Old Colony Trust Company v. Commissioner of Internal Revenue*, 102 Fed. (2d) 380; *In re Weick* holding that the endowment provision of a policy is merely incident to the life insurance; *Maskowitz v. Davis* holding that addition of cash and loan values and provision for extended insurance in a Pure Endowment Policy did not change its nature as an investment contract nor convert it into life insurance; and *Old Colony Trust Company v. Commissioner of Internal Revenue* holding that an annuity policy issued by the Sun Life Assurance Company did not become a policy of life insurance by the inclusion of an incidental provision for the payment of a benefit upon the contingency of death.

(B) On the question as to the exclusion of evidence showing the intention of the parties to the Purchase Agreement, the second decision of the Court of Appeals

is also in conflict with the decisions of other Circuit Courts of Appeals in the following cases, each of which held that where the meaning of contract language is doubtful or ambiguous, evidence of the intention of the parties at the time the contract was executed is competent to assist the court in correctly construing the contract:

Corbett v. Winston Elkhorn Coal Co., 296 Fed. 577—Circuit Court of Appeals, Sixth Circuit;

Markey et al. v. Brunson, 286 Fed. 893—Circuit Court of Appeals, Fourth Circuit;

Lovelace, et al, v. Southwestern Petroleum Co., et al, 267 Fed. 513—Circuit Court of Appeals, Sixth Circuit;

Western Battery & Supply Co. v. Hazelett Storage Battery Co., 61 Fed. (2d) 220—Circuit Court of Appeals, Eighth Circuit.

(C) In face of the fact that the Purchase Agreement is a negotiated reinsurance contract between petitioner and the Superintendent of the Insurance Department of Missouri, the Circuit Court of Appeals in its second decision held that the Purchase Agreement "is one for life insurance" [R. at 790] and that "the usual rule of construction against an insurer's own praseology" is applicable [R. at 791]. In thus applying the rule of strict construction the decision is in conflict with the following decisions of other Circuit Courts of Appeals:

Bruckner-Mitchell v. Sun Indemnity Co. (Dist. Ct. of App.), 82 Fed. (2d) 434;

Alliance Life Ins. Co. v. Saliba (C. C. A. 8), 87 (2d) 937;

Stevens v. Life Assur. Soc. (C. C. A. 7th), 101 Fed. (2d) 383, 390.

The above decisions hold that in negotiated contracts for reinsurance between companies, or between the liquidating agents of an insolvent company and the reinsuring company, the rule of strict construction should not be applied to resolve an ambiguity in the reinsurance agreement, but that the contract should be construed in the light of the circumstances surrounding the execution of the agreement and the construction adopted by the parties. As stated in *Stevens v. Life Assurance Soc.*, 101 Fed. (2d) 383, 390:

> "We do not believe that the circumstances under which the reinsurance contract was drafted and executed by the defendant and the receiver called for the application to it of the rule of construction that ambiguities of language be resolved against the insurer."

The importance of these questions, aside from a correction of the erroneous principles of law contained in the last decision of the Circuit Court of Appeals, derives from the great prominence reinsurance agreements of the type involved here have had in the transaction of the insurance business in the last several years, particularly since the collapse of the financial structure in 1929 and the dwindled assets of the early Thirties resulted in many of such court-sanctioned rehabilitation contracts,* and in the further fact that a construction of the language of such agreements does not merely involve the insurer and a

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*A few examples of similar contracts are found in the following cases: *Neblett v. Carpenter*, 305 U. S. 297; *Doty v. Love*, 295 U. S. 64; *Van Schaick v. National Surety Co.*, 239 App. Div. 490, affirmed 264 N. Y. 473; *Van Schaick v. Title & Mortgage Guarantee Co.*, 264 N. Y. 69; *Stevens v. Life Assur. Soc.*, 101 Fed. (2d) 383; *Alliance Life Ins. Co. v. Saliba* (C. C. A. 8th), 87 Fed. (2d) 937.

beneficiary, but the rights of thousands of other policyholders who must rely upon the earnings of such reinsuring companies for the entire elimination or a partial reduction of liens imposed upon them through the forces of adversity.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued directed to the Circuit Court of Appeals.

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Of Counsel.

Certification.

I, John T. Gose, as counsel for the petitioner herein do hereby certify that the above and foregoing petition which I have caused to be prepared is in my judgment well founded and that it is not interposed for delay.

Dated: October ....., 1942.

JOHN T. GOSE.

APPENDIX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

General American Life Insurance Company, a corporation, vs. Mercy Brown Stephens.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

[FIRST] OPINION [R. 766].

Before: Wilbur, Denman and Mathews, Circuit Judges.

Denman, Circuit Judge:

Mercy Brown Stephens, as beneficiary of a life insurance policy issued to Louis Stephens, brought suit in the district court against the General American Life Insurance Company to recover the death benefits. General American answered alleging that the policy was void at the time of the insured's death for three reasons: (1) forfeiture of the policy for failure to keep the cash value of the policy above the total of loans and interest advanced against the policy; and (2) lapse of the policy for failure to pay the annual premium for the policy year in which the insured died. The insurer claimed that certain unpaid cash coupons payable to the insured at the date of payment of the premiums were not applicable to premium payment. It further contended (3) that if the

coupons were so applicable there had been a lien created on them which prevented so using them. Failure to make the premium payment in question was not controverted but the district court found the insurer had in its hands money which should have been applied to the satisfaction of the premium and that such payment would have raised the cash value of the policy so as to prevent forfeiture. As a result the policy was held to have been in good standing at the time of the insured's death and judgment was entered for the beneficiary in the amount of $9,942.34. The insurer appeals on the ground that the court erred in finding it had in its hands money which should have been applied to the satisfaction of the premium.

The insurance contract was a 20-year life policy for $10,000 with the premiums payable annually and was nonparticipating during the premium paying period. Three provisions of the policy are pertinent to this case. The first is that for the advancement of premiums from the loan value provisions of the policy by a "charge" of "such premium against this policy." It provides:

> "If an application for the Automatic Premium Loan privilege, signed by the Insured, either as a part of the application for this policy, or as a separate request, is received at the Home Office of the Company before default in the payment of any premium, then if any premium due after the third policy year shall not be paid at the expiration of the period of grace, the Company will charge such premium against this policy as a loan in accordance with the provision

of the 'Cash Loans' clause of the policy, provided the then available loan value shall be sufficient to enable such advance, or if insufficient, the Company will so charge a semi-annual or quarterly premium against the policy but not less than a quarterly premium, and interest on all indebtedness to the date on which the next such premium shall become due; if, at any time, however, the available loan value shall be less than the amount of any such advance required, then the amount of the available loan value shall be applied to the purchase of extended insurance in accordance with the 'Automatic Extended Insurance' provision of the policy."

Application for the Automatic Premium Loan Privilege in accordance with the above provision was made by the insured as a part of his application for the policy.

The second provision with which we are concerned is that extending to the insured the right to cash loans on the "sole security" of the policy. It contains the following clause:

"Whenever the amount of the total indebtedness (cash loans plus interest) equal the cash surrender value, the policy shall become void one month (not less than thirty days) after the Company shall have mailed notice to the last known address of the Insured and of the assignee of record, if any."

The third pertinent provision is attached to the policy as a rider, entitled "New Triple Option—Guaranteed

Premium Reductions," the provisions of which are set out in the footnote* below.

Attached to the rider were 19 coupons, each of which, except for the amounts and the dates of maturity, was in the following form:

"On or at
any time after Mar. 20, 1927 $120.60

International
Life Insurance Co.
St. Louis, Mo.

Will pay to the order of the Insured under Policy No. 156284 (or to the order of the assignee if said policy is assigned).....120.60.....Dollars Subject to conditions of said policy, provided all premiums due on said policy up to and including said date have been paid.

PAYABLE AT ITS HOME OFFICE

No. 2

R. PAISLEY,
President."

---

*"This policy is issued on the New Triple Guaranteed Premium Reduction plan, and in the use of the coupons, the Insured may select one of the three following options:

Option 1. The Insured may use the amounts designated in the coupons hereto attached for the reduction of his premium payments from year to year.

Option 2. The Insured may elect to pay all premiums without reduction in which case the Company guarantees that, after payment of premiums in full for 16 years and surrender of this policy duly discharged and all attached coupons to the Company, a policy paid-up for life for the face amount hereof, granting excess interest dividends, will be issued. If the available cash value and coupon accumulation is in excess of the net single premium for such paid-up insurance according to the American Experience Table of Mortality and interest at the rate of three and one-half per cent per annum, such excess shall be paid in cash to the Insured.

Option 3. The insured may elect to pay all premiums without reductions, in which case the Company guarantees that this policy

Each coupon contained a maturity date which corresponded exactly with the date when an annual premium on the policy became due.

The insured paid the premium annually from the date of issuance of the policy until nine annual premiums had been paid, which maintained the policy in full force and effect up to the 10th policy year beginning March 20, 1934. The coupons attached to the policy were allowed to accumulate until during the ninth policy year (which commenced March 20, 1933) eight coupons had matured. During April of that year, the coupons which had matured were presented to Missouri State Life Insurance Company for cash payment but that company made the excuse of an insurance moratorium and refused cash payment.** In response to a renewed demand of July 7, 1933, insured was paid cash for coupon No. 1. Coupons Nos. 2-8 were never paid.

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shall mature as an endowment after paying the premiums in full for 18 years; and, upon surrender of this policy duly discharged and all attached coupons on the first anniversary of this policy after such payments are completed, the face amount of the policy less any indebtedness to the Company, will be paid in cash. If the available cash value and coupon accumulation is in excess of the face amount of the policy, such excess shall be paid in cash to the Insured.

In case the Insured shall pay all premiums in full, without coupon reduction, the unused due coupons shall be placed to the credit of the policy and shall be payable at any time, together with compound interest at the rate of three and one-half per cent per annum for each full year after due dates thereof; or, in the event of the death of the Insured said amount shall be payable to the beneficiary in addition to the face amount of the policy.

Accumulated value of coupons, at the end of 5th Yr. $533.30, 10th Yr. $1401.40, 15th Yr. $2,532.20, 20th Yr. $3,975.10."

**The policy was originally issued by International Life Insurance Company but it was reinsured by the Missouri State Life Insurance Company three years after issuance.

On August 28, 1933, Missouri State Life Insurance Company was declared insolvent and on September 7, 1933, assets of the insolvent company were sold to General American Life Insurance Company, herein referred to as the Insurer.

A "Certificate of Assumption" showing that the insurer had assumed the policies of Missouri State Life Insurance Company was sent the insured by the insurer. The certificate recited that pursuant to the "Purchase Agreement" there existed a lien against the insured's policy of $1,054. The provision of the "Purchase Agreement" out of which the claimed lien arose is set forth in the footnote below.*

On January 19, 1933, the insured executed a policy loan agreement to secure cash advances of $3050 against the policy. By the loan agreement the policy was assigned to the insurer as its "security" and annual interest was made payable in advance. Since at this time coupons

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*Section (c) Liens.—Inasmuch as the present appraised value of the assets purchased hereunder is less than the required reserves, a lien (adjusted to the nearest dollar) equal to 50% of the terminal reserve on each policy of life insurance and each annuity policy as such reserve has been established in the accounts of the Old Company, computed as of September 1, 1933, to the date to which premiums on such policies have been paid, will be established and placed against such policy; provided, that in no case shall such lien exceed the amount by which said reserve shall be in excess of the indebtedness on any such policy as of September 1, 1933. Such lien shall bear interest at the rate of five per cent (5%) per annum from September 1, 1933, until September 1, 1948, and thereafter at the rate of four per cent (4%) per annum, such interest to be paid on each policy anniversary date, and if not so paid, to be compounded annually; and said lien and interest shall be treated otherwise in all respects and with like effect as policy loan indebtedness under the terms of such policy. Such lien and its accumulation shall be carried as an asset by the New Company with like effect and in like manner as policy loans. * * *."

Nos. 1-8 were due and unused and, according to the provisions of the "Premium Reduction Plan" set out *supra*, were "to the credit of the policy," the insured after the assignment held both the policy and the credits to the policy as security for the loan.

The sums thus loaned to the insured equalled the full cash and loan value of the policy for the ninth premium year. The ninth premium year ended March 20, 1934, and on that date the insurer sent to the insured the following notice of forfeiture of policy:

> "Notice of Forfeiture.
>
> "Interest is due as indicated on the reverse side of this notice and payment should be made to the collection office designated hereon.
>
> Your policy contains a clause providing that failure to repay any loan on the policy or to pay interest thereon, shall not avoid the policy unless the total indebtedness to the Company shall equal or exceed the cash value of the policy, nor until one month after notice shall have been mailed to you to the address last known by the Company.
>
> Inasmuch as the amount of the outstanding indebtedness on your policy equals the present available cash value the policy has lapsed and will be void in accordance with its terms, unless the interest thereon is paid within the period stated in the preceding paragraph."

The interest payment demanded was in the amount of $183.00. The 10th annual premium of $936 became due on the same date. The sum of $1,054 was by this time due insured on matured and accumulated coupons Nos. 2-8. The insured died seven months later, October 22,

1934, without having made payment of either the demanded interest payment or the 10th annual premium.

The district court found that the matured accumulated and unused coupons were not subject to the lien of the purchase agreement and were available for the payment of the annual premium due on March 20, 1934; that the insurer was obligated so to apply the value of the coupons in order to prevent a forfeiture of the policy; that if coupon sums had been so applied to the payment of the premium the cash and loan value of the policy would have been increased from $3050 to $3450, according to the "Table of Guaranteed Values" contained in the policy, an amount in excess of the total indebtedness on the policy of March 20, 1934. The court therefore held that the policy was not properly forfeited for failure to keep the cash value of the policy above the indebtedness on the policy and that it did not lapse for failure to make the 10th premium payment.

I. In support of the judgment of the district court, the beneficiary relies upon the doctrine broadly stated in many cases "that an insurer is not justified in declaring a forfeiture of an insurance policy for the nonpayment of a premium when, at the time such premium accrues, the insurer is indebted to the assured, either for dividends declared or other funds which it may have in its hands belonging to the policy holder." American Nat. Life Ins. Co. v. Yee Lin Shee, 104 F. (2d) 688, 693 (CCA-9). It is not necessary to decide whether this doctrine should be applied to the present case in view of the assignment of the policy with its coupon credit as security for the repayment of the loan.

After providing certain options may be exercised by the insured in the use of the matured coupons, the "Guaranteed Premium Reduction Plan" provides:

> "In case the Insured pay *all*[*] premiums in full, without coupon reduction, the unused due coupons shall be placed to the credit of the policy and shall be payable at any time, together with compound interest at the rate of three and one-half per cent per annum for each full year after dates thereof * * *." (Emphasis supplied.)

The significant fact here is that the credit is to the "policy" and not to the insured. Ordinarily money loaned on a policy of life insurance does not constitute a personal obligation and the loan is payable only out of any proceeds at maturity.** Here security, the assignment of the policy with its coupon credits, is given for payment of the loan, indicating that the insured as borrower intends the coupon credit to the policy shall be exhausted in discharge of the loan and the policy kept alive.

At the time of the expiration of the 31 day grace period on the 10th annual premium, the cash loan value had been

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*That this provision is not restricted in its application by the word "all" to the situation where the premiums have been paid for the whole period of 20 years is apparent when compared with another provision below:

> "If all premiums on this policy shall have been paid in full, without coupon reductions, *to the end of TWENTY years*. * * * the Insured may have the choice of one of the three following options, * * *." (Emphasis supplied.)

The italicized words would be unnecessary if by the word "all' in the clause first cited was meant the whole premium paying period.

**Board of Assessors of Orleans Parish v. New York Life Ins. Co., 216 U. S. 517; Williams v. Union Central Life Ins. Co., 291 U. S. 170; Wagner v. Thierot, 203 App. Div. 757, 197 N. Y. S. 560, aff'd 236 N. Y. 588, 142 N. E. 295; Manufacturing Trust Co. v. Equitable Life, 244 App. Div. 361, 279 N. Y. S. 457.

exhausted. The value of the then due and unused coupons which were "to the credit of the policy" amounted to $1054. Applying this security of $1054 to the loan of $3050, which just equalled the cash surrender value of the policy, plus the interest of $183, left the cash surrender value a credit to the policy of $871. Since in the insured's application he had exercised his option to have this applied *pro tanto* to his premium due of $936, it procured an extension of the policy for a period beyond the seven months later when insured died.*

II. The insured contends, however, that the coupon credits were not free so to be used because under the purchase agreement it has a lien on the coupon reserve.

The beneficiary contends that the insurer has not proved that it had established in the accounts of the insurer any coupon reserve and that in any event the phrase "terminal reserve" of such a coupon life policy does not include an amount for the policy's coupon liabilities.

The pertinent portion of the clause creating the claimed lien is:

> "* * * a lien * * * equal to 50% of the terminal reesrve on each policy of life insurance * * * *as such reserve has been established in the accounts of the Old Company, computed as of September 1, 1933,* * * *." (Emphasis supplied.)

---

*The "Automatic Premium Loan privilege" provision states that if the amount of the available loan value of the policy is insufficient to pay a whole premium, "the Company will so charge a semi-annual or quarterly premium against the policy but not less than a quarterly premium, and interest on all indebtedness to the date on which the next such premium shall become due * * *."

The terminal reserve of the policy is the reserve to meet its increasing obligations at the termination of its annual accounting period. It is claimed by the insurer that the terminal reserve of the insured's life policy "as established in the accounts of the Old Company" (Missouri State Life) includes an item of reserve to pay the coupons, upon which the assumption contract creates a lien.

We have seen that until paid these coupons are "credited to" the *policy* by its express terms. They are integral parts of the entire insurance contract. In making the contract for the assumption of the liability of the Old Company on its outstanding policies, it is obvious that the insurance commissioner and the insurer would be as much concerned with the reserves to meet the coupons credited to the policy as to those to meet the credit of its cash surrender value.

The district court decided that the reserve of the policy did not include its coupon liability because required to make an interpretation adverse to the insurer of two of the phrases of the lien provision above quoted of the assumption contract. These are the phrase "accounts of the Old Company" and the phrase "terminal reserve."

The court construed the contract between the insurance commissioner and the assuming company against the latter as if it were a policy issued to the insured. With this we cannot concur for two reasons.

In the first place the contract is not one shown to be drawn by the insurer without participation on behalf of the insured. We may properly assume that the insurance commissioner and the assuming company dealt at

arms' length in framing the contract terms, including the lien provisions. Hence the rule as to interpretation of ambiguities against the insurer does not apply.

In the second place the rule of construction against the insurer is not one of *after wisdom* to be applied in each case to bring a verdict for the insured. It is a rule to be applied *looking forward from the making of the insurance contract* with reference to the benefit of *all* the insured in the class for which that form of contract exists. For example, take the policy here with its coupon provisions. Assume two insured persons have borrowed nothing on their policies and hence have not assigned their policies with the effect above indicated, and that they have not exercised their option to have premiums charged against the loan value of the policy. Both are dissatisfied with the insurer and stop paying premiums. Both have unpaid coupons. One comes, two years later, and demands their payment and, on refusal by the insurer on the ground they have been applied to the unpaid premiums, sues the company. The other insured dies within a period to which the policy would be extended if the coupons were construed as automatically applying to the unpaid premiums. The company claims they were not so applicable and that it still owes on the coupons. His widow is denied payment of the policy principal and sues, claiming the unpaid coupons ceased to be payable in cash as soon as the insured ceased paying his premiums and became automatically applied to the premiums to keep the policy alive. It is obvious that the application of an after wisdom rule requiring that the two identical policies must be construed in opposite ways to bring about a recovery on each, produces a result which is a logical absurdity.

So with regard to the contract between the insurer and the insurance commissioner. Looking forward, it cannot be said that it may not be to the best interest of *all* the policy holders that a lien should exist on the reserve including the coupons. It may well be that the payment of the principal on all the policies, including that of the insured here, would be a far greater certainty with the lien than without. In this connection it must be remembered that the insurance commissioner represented *all* the policy holders in making the contract.

We believe that the contract should be interpreted under the ordinary rules of construction, and that the appraisal of evidence of experts concerning the meaning of its phrases, and the admissibility of evidence pertinent to its provisions, should not have been controlled by any rule of interpretation adverse to the insurer.

The insurer offered the record of the company of the liability portion of the semi-annual statement of liabilities of the company for June 30, 1933. It was prepared in a form prescribed for a report to the Missouri insurance commissioner. Such accounting is required by the Missouri law to be filed with the commissioner. The company also offered the testimony of the company's actuary in charge of the statement and of the company's accounts that its analysis would show that the terminal reserves for life insurance contracts containing such coupon agreements included the coupon liabilities.

It was also shown that life insurance companies generally prepare their accountings in similar form. There was also introduced in evidence the individual policy card of the insured, he being one of the 250,000 persons having policies accounted for in this annual accounting. The

card showed no reserves at all for ordinary life insurance, much less for a life insurance contract with the instant coupon agreements. Testimony also was offered that this accounting to be reported to the insurance commissioner was computed directly from these cards and that there was no reserve computed in the accounts of the company, except as it is set up in the annual or semi-annual statements.

The court refused to admit the document showing the accounting and the testimony showing that a coupon reserve was computed therein, because the accounting was made for the purpose of a report to the insurance commissioner. It held, in effect, that the words "as such reserve has been established in the accounts of the Old Company" might mean accounts required by law for reports to the insurance commissioner and other accounts of the company. Because in this case the account prepared for the official report tended to sustain a contention favorable to the insurer, the word "accounts" must be interpreted as accounts other than for such reports. Since the individual cards showed no reserve at all, the court held there was none to which a lien could attach.

In applying such a rule we believe the court erred. It would seem that if the accounting for the report had been against the insurer's interest, such after wisdom concerning the effect of the contract on the claim for the subsequent death of the insured would make it admissible. The proffered evidence should have been accepted.

The court also applies the same rule of interpretation, adverse to the insurer, to the phrase "terminal reserve on each policy" as modified by the phrase "as such reserve has been established in the accounts." The court construed this narrowly to mean that any reserve for coupons was "outside the terminal reserve for the company's policies."

There was conflicting expert testimony as to whether this was the interpretation customarily given to the phrase in the insurance world. It is so interpreted by the Supreme Court in Helvering v. International Life Ins. Co., 294 U. S. 686, 689. There coupon reserves were not allowed as life policy reserve deductions provided by an income tax statute, because deduction provisions in such statutes are construed against the taxpayer,—that is, he must clearly show that his claimed deduction is within the statute.

We believe the court erred in applying such a narrow rule of interpretation to the conflicting evidence of the experts given on this phrase of the contract between the insurer and the commissioner. In our opinion whatever the phrase "terminal reserve on each policy" may mean when standing alone, it here includes any amount for coupon liability which is shown to have been established by computation on the company's accounts as a reserve for that purpose.

The case is reversed for a new trial in which this rejected evidence shall be received.

Reversed.

[Endorsed]: Opinion. Filed Jun. 27, 1941. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

General American Life Insurance Company, a corporation, vs. Mercy Brown Stephens.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

[SECOND] OPINION [R. 785].

Before: Wilbur, Denman and Mathews, Circuit Judges.

Denman, Circuit Judge:

We have set aside our former decision and given further consideration to the facts as stated in the report of this case in 121 F. (2d) 218. We there held that the matured coupons attached to the policy were assigned with the policy as security for the loan to the insured. Further consideration leads us to the conclusion that the coupons were not so assigned.

After the assignment of the policy, one of the coupons was paid. This left to the insured but the first of his three options with respect to the coupons. The other two options required the surrender of *all* the coupons, both under option 2, for a fully paid-up policy after sixteen years payment of premiums, and under option 3 for the payment in cash of the face of the policy less loans after eighteen years payment of premiums. The remaining option provision is

> "Option 1. The insured may use the amounts designated in the coupons hereto attached for the

reduction of his premium payments from year to year.

* * * * * * * *

In case the Insured shall pay all premiums in full, without coupon reduction, the unused due coupons shall be placed to the credit of the policy and shall be payable at any time, together with compound interest at the rate of three and one-half per cent per annum for each full year after due dates thereof; or, in the event of the death of the Insured said amount shall be payable to the beneficiary in addition to the face amount of the policy."

When the premium became due March 20, 1934, the original insurer was bankrupt and the appellant insurer agreed to pay but half the amount due on the coupons, which the insured declined to take, as was his right. With such refusal to pay them, the insured could not be regarded as treating them as an investment at 3½ per cent. He then had but one effective use of their full value—its application to the March 20, 1934, premium as provided in option 1. The appellant with the obligation of insurer, as well as successor to the loan, was required so to apply the coupons that the policy would survive. American Nat. Ins. Co. v. Yee Lim Shee, 104 F. (2d) 688, 694 (C. C. A. 9th), where we held "The general rule is that an insurer is not justified in declaring a forfeiture of an insurance policy for the nonpayment of a premium when, at the time such premium accrues, the insurer is indebted to the assured, either for dividends declared or other funds which it may have in its hands belonging to the policy holder." Cf. Great Southern Life Ins. Co. v. Jones, 35 F. (2d) 122 (C. C. A. 8th).

It is stipulated that the value of the coupons on March 20, 1934, was $1054. The district court in its finding XI found that there was a lien on the policy in favor of appellant as of September 1, 1933, of $117.00. This is the difference (to the nearest dollar) between the reserve on the policy, $3,166.70, and the loan to the insured of $3050. This lien and its interest at 5 per cent on March 20, 1934, amounted to $120.21.

Concerning this lien, the district court failed to take into account the provision of the reinsurance contract that "Every such lien, together with the interest thereon, *will be deducted from any payment made by the New Company pursuant to the terms of each such policy or from any settlement made thereon or from the value used to purchase or provide any paid-up or extended insurance or to exercise any option provided by said policy.*" (Emphasis supplied.) This clause requires the deduction of the lien from the coupons, whether the transaction on March 20, 1934, was (1) a "payment" of the coupons, or (2) a "settlement" in which they are a part, or (3) one involving the use of the "value" of the coupons "to exercise an option."

Deducting (and thereby discharging) the lien of $120.21 from $1054, the stipulated value of the coupons, left $933.79 applicable to the premium of $936 due March 20, 1934,—that is, $2.21 less than the annual premium. However, this $933.79 was sufficient to continue the policy, since it covered three quarterly premiums under the "Automatic Extended Insurance" provision of the policy for part payment of premiums. Also under that provision, such payment increased the reserve by $300, that is,

three-fourths the $400 increase from the $3050 of March 20, 1933, to $3,350 of March 20, 1934.

On March 20, 1934, this reserve of $3,350 was of sufficient value to more than cover $3,233, the loan of $3,050 and the interest, $183, prepayable for the succeeding year. There was still left a loan value in the reserve of $117, from which, under the optional policy provision (accepted by the insured) for "Premiums Advanced from Loan Values," insured's loan was automatically increased by the $2.21 to pay the balance of the premium. This increased the principal of the loan to $3,052.21. In all, with the prepaid interest, the loan amounted to $3,235.21 at the death of the insured.

The payment of the full premium created the tenth coupon of $145.80. This coupon bore interest only for "each full year." Hence on deceased's death, on October 22, 1934, less than eight months from March 20, 1934, it was payable without interest.

On the insured's death on October 22, 1934, the policy was in full force and effect with a year's premium paid. The appellant then owed $10,145.80, being the policy's principal plus $145.80, the amount of the tenth coupon, less the loan (with its interest prepaid) of $3,235.21. The balance thus due on October 22, 1934, was $6,910.59.

This amount is $117 less than $7,027.59, the amount found by the district court to be due on insured's death. The difference appears to arise from the failure of the district court to deduct from the coupon value the $117 lien on the policy on September 1, 1933, in exercising the option to use the coupons to pay the premium.

The judgment should have been for $6,910.59, plus interest from October 22, 1934, to the judgment date,

September 25, 1940, or $9,777.14,—that is, unless the appellant insurer was entitled to have added to its lien of September 1, 1933, a further sum computed on a reserve which included the coupon liability.

This claim of a larger lien is based upon an interpretation of the lien provision of appellant's contract with the Missouri Insurance Commissioner, acting as statutory trustee for the policy holders and creditors of the defunct General American Life Insurance Company.

We are of the opinion, contrary to our former view, that the trial judge properly held that appellant's agreement is an insurance agreement to be strictly construed against appellant insurer. This is apparent from the fact that the suit here is to recover $10,000 which the appellant had agreed to pay on the death of appellee's husband. As stated, it was made by the Insurance Commissioner, acting in behalf of all the persons insured by the defunct company, with the appellant insurer. In it the latter agreed to carry out the provisions of each of the insured's policies as modified by the agreement. Appellant's agreement is one for life insurance.

The pertinent portion of the lien clause is

> "Section (c) Liens—Inasmuch as the present appraised value of the assets purchased hereunder is less than the required reserves, a lien (adjusted to the nearest dollar) equal to 50% of the terminal reserve on each policy of life insurance and each annuity policy as such reserve has been established in the accounts of the old Company, computed as of September 1, 1933, to the date to which premiums on such policies have been paid, will be established and placed against such policy; provided, that in no case shall such lien exceed the amount by which said re-

serve shall be in excess of the indebtedness on any such policy as of September 1, 1933. * * *."

Appellant repeatedly contended below that the phrase "terminal reserve on each policy of life insurance and each annuity policy as such reserve has been established in the accounts of the Old Company," was inserted in the contract at the instance of the appellant insurer.

Applying the usual rule of construction against an insurer's own phraseology, we accept as a reasonable interpretation of the phrase "terminal reserve on each policy of *life* insurance," that it is the reserve on the "life insurance" agreement only. It is such a reserve so limited which appellant must show was "established in the accounts" of the defunct company. This is the reserve upon which the district court found the lien discussed above. The court properly excluded the proffered evidence of a larger amount based upon a claimed lien based on the amount of the coupons.

The judgment is reversed. The district court is instructed to render judgment *nunc pro tunc* of date September 26, 1940, for $9,777.14, the judgment to bear interest thereon at 7 percent per annum from the date of entry.

[Endorsed]: Opinion. Filed Jul. 17, 1942. Paul P. O'Brien, Clerk.

(10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.
No. 469

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

MERCY BROWN STEPHENS,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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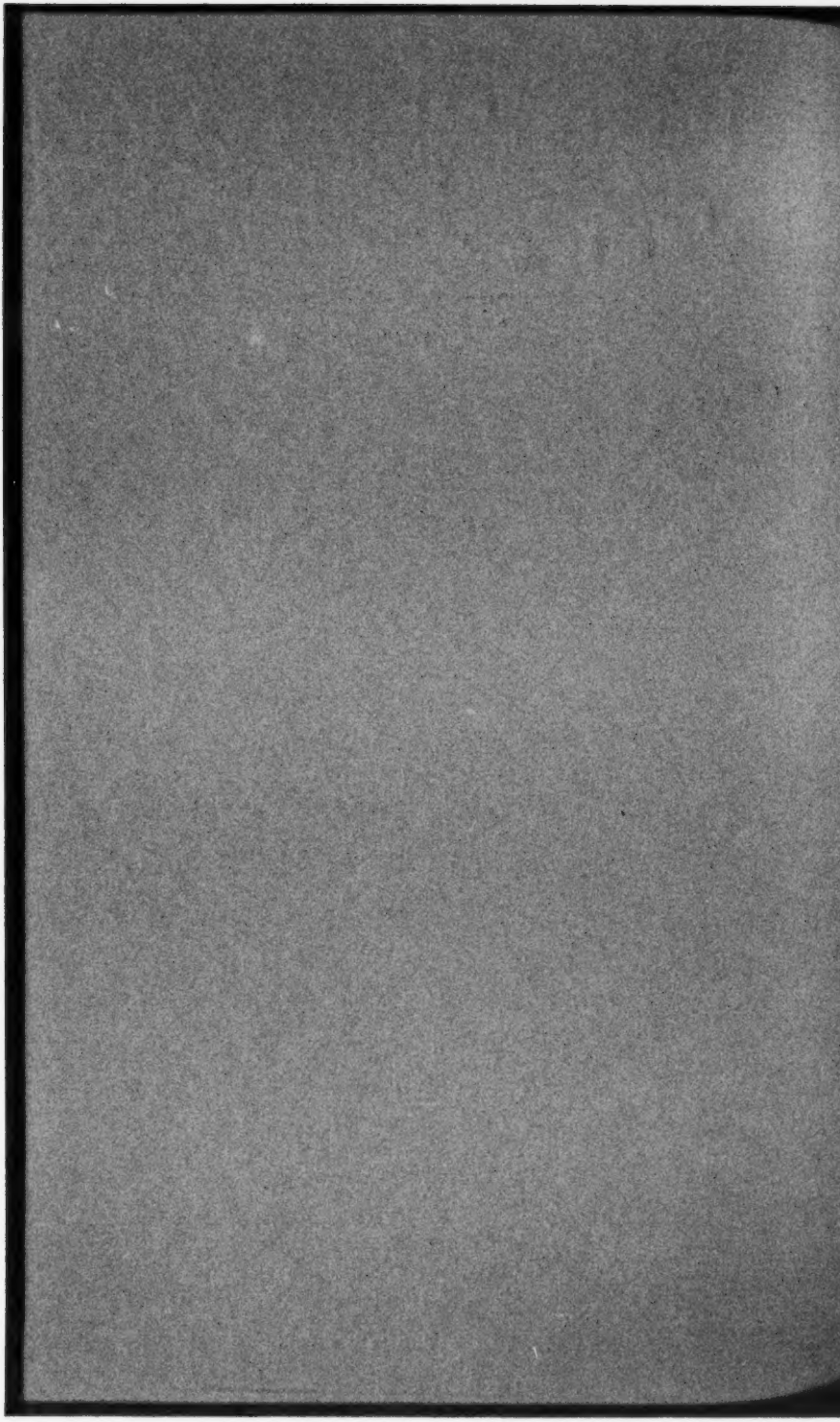

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

The reasons advanced by the petitioner as being relied upon for the allowance of the writ are of such a flimsy character that at the very outset it appears doubtful, in the exercise of sound judicial discretion whether the petition should be granted. The petition does not disclose any special or important reasons for the allowance of the writ. On the other hand neither the record nor authority supports the claims of the petitioner. In opposition to the petition we will briefly indicate why this Court should not add to its calendar the unnecessary burden of a case already well decided by the District Court and by the Circuit Court of Appeals.

Respondent challenges the "Summary Statement of Matters Involved" contained in the Petition for Writ. It is replete with careful ambiguities and silences obviously designed to give the appearance of a cause proper for review by this Court and to fit the authorities by which petitioner hopes to impress this Court. The most cursory examination of the record will show this to be an appearance possible only by ignoring the most important facts contained in the record. These facts, omitted from the petition, will demonstrate that an issue of fact was before the trial Court; that it determined that issue adversely to petitioner; that having done so it applied oft-enunciated principles of law and concluded in favor of respondent. The Circuit Court reached the same reasonable conclusion. A question of fact only being presented, which is supported by substantial evidence, this Court will not review the lower Courts' decisions. Consideration of these same facts will also show that the cases cited in the petition are not in point.

For the sake of brevity we will not restate all of the facts before discussing the claims and authorities of petitioner but we will instead call the Court's attention to the facts in the record which make petitioner's claims unfounded and their authorities pointless.

We will then show that there is nothing for this Court to review in this cause and that the determination of the trial Court and Circuit Court is amply supported by authority.

I.

The Decision of the Circuit Court of Appeals Conforms to California Law.

Petitioner first claims that the decision in this case conflicts with *Blackburn v. Home Life Insurance Company of New York,* 19 Cal. (2d) 226, 120 Pac. (2d) 31 (1941). The *Blackburn* case merely states that additional provisions in the contract between the insured and insurer written upon a separate sheet and pasted on the policy itself become an integral part of the agreement where that is the obvious intent of the parties. This is nothing more than a restatement of the doctrine of integration of instruments. How that can affect the result in the case at bar and how *Blackburn v. Home Life Insurance Company, supra,* conflicts with the decision of the Circuit Court of Appeals, is not disclosed by the petition. It is a complete *non sequitur* to say that because two writings are integrated and deemed one agreement, two separate promises, each of a different thing are to be deemed one promise of the same thing. Under the terms of the policy contract provision was made for the reserve on the policy and the manner of its disposition. By the coupon rider the insured was promised certain moneys would be paid on certain dates upon surrender of certain coupons. The policy itself shows that the reserve and the coupons had no relation to each other. [R. 175, Exhibit 1.] There the policy provides a special method of calculating the reserve, what it shall consist of, the uses to which it may be put, and its basis as required by law. [R. 175, 178, 179, 180, 181, 182, 183.] On the other hand separate provision is made for coupons. They are not calculated or based upon mortality. They have noth-

ing whatever to do with reserve. [R. 196, Exhibit 1.] These two provisions contain two different promises having essentially different characteristics. Certainly no one would contend that the mere fact that provision is made in the same policy for reserve and a life benefit of $10,000 provokes the conclusion that reserve and life benefit are one, and yet the matured coupons are in the same class as a matured life benefit.

Any idea of a possible conflict between the decision of the Circuit Court of Appeals is immediately dispelled by a consideration of certain of the facts found to be true in this case which are ignored by the petitioner. These facts are: (1) the policy itself defines "reserve" and it does *not* include the credits or values of unused due coupons within that term [Exhibit 1, R. 175, 183]; (2) the purchase agreement itself defines a lien as a policy loan and by the terms of the policy this could not be placed on the coupons, since only the reserve was subject to policy loan provisions [Exhibit 2, R. 206, 214]; (3) the word "reserve" has a technical, special and well understood meaning in the life insurance business which does not include coupon values or credits [R. 306-310, 321, 355]; (4) the words "terminal reserve" do not refer to any matured policy claim [R. 355]; (5) the matured unused coupons which were a part of this policy were matured policy claims [R. 355]; (6) the trial Court believed the evidence of respondent concerning the meaning of the words "terminal reserve" and found as a fact that terminal reserve did not include the unused matured coupons [Findings XVI, R. 116, *et seq.*]; (7) the reserve on a life insurance policy can be established in the accounts of the company and those accounts will control

only if the insurance policy does *not* itself establish the reserve [R. 346]; (8) where the policy itself does establish the reserve as here, the policy provisions control the accounts and the phrase "terminal reserve . . . as such reserve has been established in the accounts" must be taken in the insurance business to mean the reserve correctly set up in the accounts of the company as determined by the policy itself and this would not include an incorrect amount set up in the accounts as reserve [R. 343-354]; (9) the reserve determined by the policy controls and the accounts are limited to the amount so determined [R. 343-354]; (10) and the trial Court and Circuit Court so found and held [R. 116, *et seq.*, 791].

Thus whether we consider the coupon rider and the main policy as one instrument or two, the evidence shows that the matured coupons and the reserve on the policy are two different and separate rights created by the policy contract in the insured.

The authorities support this conclusion. See:

Helvering v. Intermountain Life Insurance Co., 294 U. S. 686, 79 L. Ed. 1227 (Oct. Term, 1934);

Continental Assurance Co. v. United States, 8 Fed. Supp. 474 (Ct. Claims 1934);

Helvering v. Missouri State Life Insurance Co., 78 Fed. (2d) 778 (C. C. A. 8, 1934);

Helvering v. Atlas Life Insurance Co., 78 Fed. (2d) 166 (C. C. A. 10, 1935);

Helvering v. Montana Life Insurance Co., 84 Fed. (2d) 623 (C. C. A. 9, 1936);

Fox v. Mutual Benefit Life Insurance Co., 107 Fed. (2d) 715 (C. C. A. 8, 1939).

Petitioner also claims (Petition, p. 16) that the decision below conflicts with certain California cases because it "applied the rule of strict construction against petitioner as a rule of first resort, and sustained the District Court in excluding evidence offered by petitioner of the intention and understanding of the parties to the Purchase Agreement at the time of its execution." The evidence so claimed to have been rejected consisted of Exhibit H [R. 626], Exhibit I [R. 628] and Exhibit J [R. 630]. A mere inspection of these exhibits shows that they are immaterial to the issue which petitioner seeks to raise. They do not show the intent of the parties at the time of the execution of the Purchase Agreement—September 7, 1933. They were prepared by one not a party to the agreement, and Exhibit H speaks as of June 30, 1933, Exhibit I speaks as of June 30, 1933, and Exhibit J speaks as of June 30, 1933. This is prior to the commencement of negotiations, for the decree of insolvency and order transferring the assets of the Missouri State Life Insurance Company to the Superintendent of Insurance was not made until August 28, 1942. It is clear from this that the evidence offered does not come within the rule claimed by petitioner to be applicable. This being so, the basis of conflict claimed by petitioner to exist between the decision of the Circuit Court of Appeals and the cases cited by him on pages 17 and 18 of the petition fails.

The decision of the Circuit Court of Appeals is not in conflict with *Balfour v. Fresno Canal & Irrigation Company*, 109 Cal. 221, 41 Pac. 876 (1895) for the following reasons:

1. That case limits the admissible evidence in cases of ambiguity to the conversations and declarations of the parties during the negotiations at and before the time of the contract, and petitioner in its offer of proof did not offer to prove, nor did he suggest, nor do the rejected exhibits indicate in any way, that this evidence was mentioned or considered during the negotiation of the Purchase Agreement [Exhibit 2].

2. The *Balfour* case holds that where there is no ambiguity extrinsic evidence is inadmissible. Here there was no ambiguity as to the words "terminal reserve" and hence no evidence was admissible of surrounding circumstances for the purpose of interpreting those words.

3. The ambiguity, if any, was in the words "as such reserve has been established in the accounts of the old company" and this ambiguity referred only to what documents might be considered as "accounts" of the company. The trial Court found as a fact that Exhibits H, I and J constituted no part of the accounts of the old company when it sustained respondent's objection to their admission in evidence [R. 632-711]. This finding of fact is conclusive on this Court as it was deemed to be on appeal to the Circuit Court of Appeals [R. 791].

4. The petitioner claims for the first time that it offered the rejected evidence for the purpose of construing the words "terminal reserve". In the trial Court it offered this evidence only as a part of the "accounts of the old

company" upon the theory that the reserve there established was binding upon the parties. This appears in the evidence and statements of counsel. [See R. 330, also R. 493-711.]

The decision of the Circuit Court of Appeals is not in conflict with *United Iron Works v. Outer Harbor, Dock and Wharf Company,* 168 Cal. 81, 141 Pac. 917 (1914), for the same reasons advanced above with reference to the *Balfour* case, *supra.*

The decision of the Circuit Court of Appeals is not in conflict with *Mitau, et al v. Roddan, et al,* 149 Cal. 1, 84 Pac. 145 (1906) for the following reasons:

1. This case holds that the practical construction of a contract between parties with the knowledge and consent of the parties to the contract is evidence of what was intended by the provisions. This is assuming that the terms of the contract are ambiguous.

2. Petitioner did not prove, nor offer to prove, any act or construction of the contract here in question by all of the parties thereto.

3. Petitioner did not prove, nor offer to prove, that the parties to the Purchase Agreement had any knowledge of the facts which it claims evidence the practical construction placed upon the agreement by petitioner and, on the contrary, the evidence shows that any such intent or claimed "practical construction" was a secret intent upon

the part of petitioner not known to any other party to the contract.

4. The contract itself was not ambiguous, at least not so far as the words "terminal reserve" are concerned, and the only ambiguity, if any, is as to the words "as such reserve is established in the accounts of the old company."

The decision of the Circuit Court of Appeals is not in conflict with the case of *Weaver, et ux v. Grunbaum, et al,* 87 Pac. (2d) 406 (1939) for the reasons advanced above with reference to *Mitau, et al v. Roddan, et al, supra.* It should be noted in each of these cases that the agreements construed were ambiguous and that the construction placed upon the contract by the parties thereto was with the knowledge and acquiescence of both parties, whereas in the case at bar no knowledge on the part of respondent was sought to be shown, nor does the rejected evidence tend to show in any manner a construction acquiesced in by all parties to the agreement. On the contrary, the evidence is primarily evidence of the acts of a third party, to-wit, the Missouri State Life Insurance Company which was declared insolvent August 28, 1933. The excluded portions of Exhibit E [R. 610] and Exhibit G [R. 618] were notations made upon the old original records of Missouri State Life Insurance Company by the petitioner after the execution of the purchase agreement without the knowledge of respondent, insured, or any other party to the agreement other than petitioner itself. Such evidence could not under any circumstances bind respondent.

II.

The Decision of the Circuit Court of Appeals Does Not Conflict With Any Decision of Other Circuit Courts of Appeals.

The petitioner states on page 19

> "the question whether incidental features of the contract may be considered separately or allowed to change the fundamental nature of the contract in which they are integrated has been answered in the negative by the Circuit Court of Appeals for the Sixth Circuit in In re Weick, 2 Fed. (2d) 647 and in *Maskowitz v. Davis,* 68 Fed. (2d) 818 and by the Circuit Court of Appeals for the First Circuit in *Old Colony Trust Company v. Commissioner of Internal Revenue,* 102 Fed. (2d) 380."

This statement contained in the petition is as unintelligible and pointless as are the cases cited. It is the same as though the petitioner had stated that the question of whether the coat is red or black has been answered in the negative, and is just about as relevant. We have already pointed out in connection with *Blackburn v. Home Life Insurance Company of New York,* 19 Cal. (2d) 226, 120 Pac. (2d) 31, in the first part of this brief that cases referring to integration of instruments can not affect the result reached by the District Court and Circuit Court of Appeals, nor are they in conflict with that result. Reference is made to the discussion in connection with the *Blackburn* case.

On page 20 of the petition are cited four Federal cases decided by Circuit Courts of Appeals to the effect that in case of ambiguity evidence of the intention of the parties at the time the contract was executed is competent

to assist the court in correctly construing the contract. These cases state the same rule existing in California and are clearly not in conflict with the decision of the Circuit Court of Appeals upon petitioner's own statement of their holding. Reference is made to the discussion in connection with *Balfour v. Fresno Canal and Irrigation Company,* 109 Cal. 221, 41 Pac. 876 (1895), and *United Iron Works v. Outer Harbor, Dock and Wharf Company,* 168 Cal. 81, 141 Pac. 917 (1914) in the foregoing part of this brief wherein we pointed out the reasons why the decision of the Circuit Court of Appeals in the case at bar was not in conflict with those cases. The same reasons may be applied to the cases cited on page 20 of the petition.

Petitioner contends that the application of the rule of construction against an insurer's own phraseology is in conflict with certain Circuit Court of Appeals decisions in so far as it is applied to the Purchase Agreement. In support of this he cites *Bruckner-Mitchell v. Sun Indemnity Company,* 82 Fed. (2d) 434; *Alliance Life Insurance Company v. Seliba,* 87 Fed. (2d) 937 (C. C. A. 8); and *Stevens v. Life Assurance Society,* 101 Fed. (2d) 383, 390 (C. C. A. 7). The *Bruckner-Mitchell* case and *Alliance Life Insurance* case, *supra,* do not support the claims of petitioner. They do not deal with a purchase and assumption contract such as is here under consideration and on the contrary they deal solely with re-insurance agreements. The *Stevens* case is the only case even remotely in point and in that case the Court does not hold

that the rule of construction against the insurer should not be applied as is indicated by the language of the Court immediately following that quoted by the petitioner, which is as follows:

> "We do not believe that the circumstances under which the reinsurance contract was drafted and executed by the defendant and the receiver called for the application to it of the rule of construction that ambiguities of language be resolved against the insurer. *However, that is an academic question in this case, since we find no ambiguities of language in any provisions material to our investigation in this appeal.*"

But this case cannot control even though we assume *arguendo* that it states the rule contended for by petitioner. The reason is obvious, for the Circuit Court of Appeals in the case at bar placed its decision upon the fact that

> "appellant repeatedly contended below that the phrase 'terminal reserve on each policy of life insurance and each annuity policy as such reserve has been established in the acts of the old company' was inserted in the contract at the insistence of the appellant insurer."

Thus the general rule that language will be construed against the party using it which is established in both Federal and California decisions is applicable regardless of the life insurance angles to the contract in the case at bar.

III.

The Petition for Certiorari Presents No Question for Review by This Court.

The petition for certiorari reveals that petitioner's only complaint is that the trial Court rejected Exhibits H, I, J, E and G, together with certain proffered oral evidence explanatory thereof. Stripped of nonessentials petitioner complains that it was error for the trial Court to reject this evidence and that the Circuit Court of Appeals decision sustaining the trial Court conflicts with local and federal decisions for these reasons: (1) The contract was ambiguous and the evidence should have been received as evidence of the surrounding circumstances for the purpose of showing the intent of the parties to the agreement; (2) The contract was ambiguous and the evidence should have been admitted to show the construction placed upon the contract by the parties themselves; (3) The Circuit Court of Appeals erred in applying the rule of construction against the insurer's own phraseology.

Brief considerations of these points will demonstrate that not one is now reviewable on appeal. It is a well established rule that questions of the admissibility of evidence are for the determination of the Court; and this is so whether its admission depends upon law or fact. Where it depends upon a preliminary question of fact, the finding of the trial Court upon such preliminary question of fact is not subject to reversal on appeal if it be fairly supported by the evidence. (*Gila Valley, G. & N. R. Co. v. Hall,* 232 U. S. 94, 58 L. Ed. 521 (1913).)

With this rule of appellate practice in mind the exclusion of the rejected evidence by the trial Court is con-

clusive upon this Court, as it was upon the Circuit Court of Appeals.

The rejected evidence was not admissible as evidence of the circumstances surrounding the execution of the purchase and assumption agreement unless the trial court first found the following preliminary facts to exist upon evidence adduced by petitioner:

(a) that the contract was ambiguous and susceptible of two constructions; (b) that in negotiating the purchase agreement the parties thereto were aware of the proffered evidence and contracted with reference thereto; (*Balfour v. Fresno Canal Irrigation Co.*, 109 Cal. 221, 41 Pac. 876 (1895)); (c) the proffered evidence was offered for the purpose of removing an uncertainty in the language of the contract but not for the purpose of raising a doubt in the clear meaning of its terms. (*Hercules Glue Co. v. Littooy,* 25 Cal. App. (2d) 182, 76 Pac. (2d) 700); and (d) that the proffered evidence had some probative bearing upon the intent of the parties in relation to the agreement entered into (*Paulin v. Paulin,* 39 Cal. App. (2d) 180, 185, 101 Pac. (2d) 809 (1940)). There can be no doubt but that the trial court found against petitioner on the preliminary matters designated (b), (c) and (d) above. First, nothing appears in the offer of proof or in any of the preliminary foundation evidence that Exhibits H, I, J, E and G, were used or referred to or considered in the negotiations leading up to the execution of the purchase agreement dated September 7, 1933. [R. 599-711.] Second, the proffered evidence was not offered for the purpose of removing an uncertainty, but on the contrary the evidence was offered upon the theory that the exhibits constituted a part of the accounts

of the old company and that as such they were the documents referred to in the provision "as such reserve is established in the accounts of the Old Company." Third, in order that the rejected evidence might have some probative bearing upon the intent of the parties, it was necessary that it be shown by the petitioner that the parties to the purchase agreement considered this evidence in their negotiations, and that it had some direct bearing upon the meaning of the words "Terminal Reserve", or that the rejected evidence constituted some part of the accounts of the Old Company within the meaning of the phrase "as such reserve is established upon the accounts of the Old Company".

As we have indicated before, the Court found as a fact against the defendant after consideration not only of the evidence in the record, but also of the statements of counsel, and in examination of the documents offered. It is clear also, that the words "terminal reserve" govern the provision with reference to accounts, and as indicated by the Circuit Court of Appeals, it is such a reserve on each policy of *life* insurance so limited which appellant was required to show was "established in the accounts". This, petitioner could not do. Furthermore, this construction is a reasonable one, and when the construction given the instrument by a trial court appears reasonable and consistent with the intent of the parties making it, appellate courts will not substitute another interpretation though it seems equally tenable.

Estate of Bourn, 25 Cal. App. (2d) 590;

Estate of Mallon, 34 Cal. App. (2d) 147;

Adams v. Petroleum Midway Co. Ltd., 205 Cal. 221.

The rejected evidence was not admissible to show the construction placed upon the contracts by the parties themselves unless as a preliminary matter it were first shown that (a) the part of the contract sought to be interpreted was ambiguous; (b) the particular construction placed upon the contract was placed thereon openly and was actually within the knowledge of all the parties to the agreement; and (c) all the parties with knowledge of such particular construction acquiesced therein.

At no time did petitioner prove or offer to prove any one of these preliminary facts. In the petition on file the principal contention is with reference to the phrase "terminal reserve". In that connection the record shows that in the trial court the only question was the technical and special meaning of those words in the life insurance business.

Where technical words or phrases are used in a contract, such as "terminal reserve" in the contract in the case at bar, expert testimony is admissible for the purpose of showing that such words have a technical, special and well defined meaning. Such testimony merely explains the meaning of the language as used in the contract.

In recognition of that rule the Supreme Court of the United States in *Moran v. Prather,* 23 L. Ed. 121, at page 122, said:

> "Cases arise, undoubtedly, in which the testimony of expert witnesses is admissible to explain terms of art and technical words or phrases, and it may be admitted that a certain instrument may be so interspersed with such technical terms that it would be error in the court to exclude the testimony of persons skilled in such matters, if duly offered by the proper party in the litigation."

See, also:

22 C. J., Sec. 1602, p. 1203;

20 Am. Jur., pp. 1004-1005, Sec. 1151;

Wigmore on Evidence, 2d Ed., Sec. 1955, pp. 171-172;

C. C. of California, Sec. 1645.

The only ambiguity, if any, arose with reference to what constituted these "accounts" and what force should be given to the words as "established in the accounts of the Old Company". The evidence offered did not even approach an attempt to prove a particular construction. With the exception of the excluded portions of the Exhibits E and G all the other evidence concerns the activities of a stranger to the contract, to-wit, Missouri State Life Insurance Co., whose reports were neither known nor considered by any other party to the agreement. The excluded portions of Exhibits E and G were added by petitioner apparently as a memoranda for its own benefit. They were not known by any other person, and hence were not acquiesced in by them. It is also obviously apparent that the parties to the agreement in suit are not the Superintendent of Insurance of the State of Missouri, and the General American Life Company, but the parties to the agreement in suit are the petitioner and respondent. This is so for the reason that the agreement between the General American Life Insurance Company and the Superintendent of Insurance was a third party beneficiary contract, and as such constituted an offer to all policy holders. When accepted by them it constituted an agreement between themselves with reference to their individual policies and the petitioner General American Life Insurance Company. Any construction placed upon that agree-

ment between the policy holder and the Company would necessarily have to be acquiesced in by the policy holder and the Company before it could be considered as evidence of the intent of the parties. Petitioner did not attempt to prove that the insured ever heard of the entries improperly made by the Company on Exhibits E and G.

Finally, petitioner contends that the Circuit Court of Appeals erred in applying the rule of construction against the insurer's own phraseology. It seems to be under the misapprehension that this rule was applied because the Circuit Court of Appeals was considering a life insurance policy. Petitioner also seems to be under the misapprehension that only in the case of life insurance policies is such a construction used. Respondent submits that the decision of the Circuit Court of Appeals was clear on this point. Thus, that Court states "Appellant repeatedly contended below that the phrase 'terminal reserve' on each policy of life insurance and each annuity policy as such reserve has been established in the accounts of the 'Old Company' was inserted in the contract at the instance of the appellant insurer." [R. 790.] With this fact before it, the Court followed the general rule of California law, and as we understand it, the law of every common law jurisdiction, that the phraseology of a contract will be construed against the person responsible for its usage. See Sec. 1654, Civil Code of California. That is what the Court did in this case. It would make no difference whether this were a purchase agreement, a policy of life insurance, or a simple agreement of sale, the same rule would be applied in any instance. It is clear from this that the opinion of the Circuit Court of Appeals is correct on its face and that therefore this Court will not grant a writ of certiorari.

IV.

The Decision of the Circuit Court Is Amply Supported by Authority.

Since the question of the meaning of the purchase agreement is challenged in this proceeding, we will here set forth the authorities which support the decision of the Circuit Court of Appeals and the trial court, with respect to that agreement. The decision below may be sustained upon either of two grounds. A consideration of the purpose and intent of the lien of the purchase agreement will lead irrevocably to the conclusion that it cannot affect the coupon values. A consideration of the meaning of the words used in the purchase agreement as they have been judicially defined will lead to the same conclusion.

First. The purpose of a lien in an agreement of this type is simply to reduce the liabilities of an insurance company to the extent necessary to make them fit the assets without making it appear that any obligation has in fact been repudiated. This is done by cutting down the principal obligation which an insurance company has, to-wit, the technical life "reserve" which does not include any fixed value such as coupons. Nevertheless, this whittling down process is accomplished in such manner that the profits on the business may ultimately restore the obligation to its full value, thereby causing no loss to any creditor or policy holder. This can be done only by placing an individual policy loan upon each policy of life insurance by a device known as a lien upon the reserve. A policy loan may be placed only upon the reserve of each policy of life insurance to the extent defined in each particular policy, since if the policy loan or lien were to exceed the amount provided or allowed in

any particular policy, that policy would lapse by its own terms. This being true, in any case where a policy loan had already been made upon the policy, the only amount available for an additional policy loan would be the difference between the policy loan value fixed by the policy and the total policy loan already in existence. Thus the provision in the "purchase agreement" that in no case should the lien exceed the difference between any policy loan and the total reserve of the policy loan value on the policy. The policy in suit fixed the amount of the policy lien at 50% of the "terminal reserve" and expressly provided that the lien should be treated in all respects and with like effect as policy loan indebtedness. [R. 214.] In computing this lien no consideration could be given to coupons, especially the matured and unused coupons. They were no part of the reserve, and bore no relation to the terminal reserve. They were no part of the policy loan value. Being no part of the policy loan value, there was nothing upon which an insurance lien might be placed in connection with such coupons. Hence, the conclusion follows that the coupons were not affected by the total lien and were available to prevent a forfeiture. For a full discussion of this matter, see *Watts Life Insurance Reorganization,* 29 Ill. L. R. 559.

Second. The following is a brief statement of the points and authorities upon which respondent relies.

The intent of the parties to the "purchase agreement" can be and must be ascertained from the terms of the instrument itself.

Brandt v. Cal. Dairies, Inc., 4 Cal. (2d) 128; 48 Pac. (2d) 13 (1935);

Barnhart Aircraft, Inc. v. Preston, 212 Cal. 19; 297 Pac. 20 (1931).

By the "purchase agreement" petitioner assumed all obligations of the Old Company, including the policy in suit, and policy holders and creditors could elect whether they would file a claim against the receivers or accept the provisions of the "purchase agreement". *Lovell v. St. Louis Mutual L. I. Co.*, 111 U. S. 264 (1884); *Lucas v. Pittsburg L. & T. Co.*, 137 Va. 255, 119 S. E. 109 (1923); *Watts Life Ins. Reorganization*, 29 Ill. L. R. 559. In this case the insured elected to accept the provisions of the "purchase agreement" and by his acceptance a contract was effected between petitioner and respondent, the only basis of which was the terms of the agreement as written. In the agreement technical words were used. The words "terminal reserve" being technical words and having a special and well understood meaning in life insurance business, the evidence of experts was admissible for the purpose of proving the meaning of those words. (See authorities cited above.)

The words "as such reserve has been established in the accounts of the Old Company computed as of September 1, 1933, to the date to which premiums on such policies have been paid" relate back to the words 'terminal reserve" for the word "such" always refers to an antecedent in the context of the instrument. Here it refers to terminal reserve.

Mitchell v. Packham, 103 Md. 693, 63 At. 219 (1906);

Webster's International Dictionary;

Summerman v. Knowles, 33 N. J. L. 202 (1868);

Evan v. State, 150 Ind. 651, 50 N. E. 820 (1898);

Warner Elevator Mfg. Co. v. Houston, 28 S. W. 405 (Tex. 1894).

The words "terminal reserve" as used in the "purchase agreement" had no reference to and did not include the credits and values evidenced by the matured coupons.

Testimony of Mr. Herfurth, R. 355, 359-378;

Testimony of Mr. May, R. 511-519;

Helvering v. Intermountain Life Insurance Co., 294 U. S. 686, 79 L. Ed. 1227 (Oct. Term, 1934);

Continental Assurance Company v. United States, 8 Fed. Supp. 474 (Ct. Claims, 1934);

Helvering v. Missouri State Life Ins. Co., 78 Fed. (2d) 778 (C. C. A. 8, 1934);

Helvering v. Atlas Life Ins. Co., 78 Fed. (2d) 166 (C. C. A. 10, 1935);

Helvering v. Montana Life Ins. Co., 84 Fed. (2d) 623 (C. C. A. 9, 1936);

Fox v. Mutual Benefit Life Ins. Co., 107 Fed. (2d) 715 (C. C. A. 8, 1939).

The trial court found as a fact based upon expert testimony that the coupon values and credits could not be included within "terminal reserve" and that hence the lien did not relate to or affect the coupons. This court is *bound* by this finding of fact.

Runkle v. Burnham, 153 U. S. 216, 38 L. Ed. 694;

Dooley v. Pease, 180 U. S. 126, 45 L. Ed. 457;

Canadian Nat. Ry. Co. v. Geo. M. Jones Co., 27 Fed. (2d) 240 (C. C. A. 6);

Corey v. Atlas Coal & Coke Co., 277 Fed. 138 (C. C. A. 6);

Templar Motors Co. v. Bay State Pump Co., 289 Fed. 24 (C. C. A. 6);

Hathaway v. First National Bank of Cambridge, 134 U. S. 494, 10 S. Ct. 608, 33 L. Ed. 1004.

In view of all the foregoing, we believe that the Court must, and that it will deny the petition for a writ of certiorari.

Respectfully submitted,

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